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In The

Supreme Court of the United States

October Term, 1994

IN RE ESTATE OF SHELTON A. McHENRY, *Deceased.*

EDWARD S. HALL, *et al.*,

Petitioners,

vs.

THOMAS E. O'SULLIVAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARSHALL W. VORKINK –
Cal. Bar No. 025809
KENT M. BRIDWELL* –
Cal. Bar No. 056618
MICHAEL M. BERGFELD –
Cal. Bar No. 138890
CUMMINS & WHITE
865 S. Figueroa Street
24th Floor
Los Angeles, CA 90017-1695
213/614-1000
* *Counsel of Record*

Attorneys for Respondent, Estate of John T. Lynch, Deceased

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OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The instant petition represents a misguided and ultimately futile attempt to fabricate an issue of constitutional dimension. Petitioners vigorously chant a number of homilies about legal ethics, attempting to tantalize this Court with purported questions of significant public interest. However, the actual record does not support consideration of any such issues. Moreover, they touch upon matters which are properly subject to exclusive

state regulation. In other words, no significant federal question is presented.

Apparently recognizing these deficiencies, petitioners attempt to weave a theme of "due process" throughout their argument. Yet, they give only lip service to this constitutional theory, and they never really explain how it actually bears upon the legitimate elements of this case. Their transparent attempt to exaggerate the issues and distort the record should not be taken at face value. Instead, a proper examination will disclose that there are no issues which warrant this Court's valuable attention.

THE IDENTITY AND POSITION OF RESPONDENT LYNCH

As acknowledged in the petition, Shelton McHenry named two individuals to receive the residue of his estate. One was Thomas E. O'Sullivan, McHenry's attorney and the person who drafted his Will.

The second residual beneficiary was John T. Lynch, who had faithfully served as McHenry's business manager for more than fifteen years. Mr. Lynch, who was not an attorney, had absolutely nothing to do with the procurement or execution of McHenry's Will.

Unfortunately, due to the protracted duration of this will contest (pending since 1987), John Lynch never enjoyed a single penny from McHenry's estate. Mr. Lynch died of cancer on August 1, 1993. The undersigned attorneys now represent his widow and personal representative, Elizabeth Lynch, in connection with these

proceedings. His estate, as the real party in interest, hereinafter will be referred to simply as "Lynch."

Lynch opposes the instant petition for a number of reasons described below. However, in the event that this Court should decide to grant certiorari, Lynch requests that review be expressly limited to a consideration of McHenry's *severable* gift to O'Sullivan. The issues advanced by petitioners have no legitimate bearing on the separate gift to Lynch. (See *Estate of Molera*, 23 Cal.App.3d 993, 1001, 100 Cal.Rptr. 696 (1972); *Estate of Stauffer*, 142 Cal.App.2d 35, 41, 297 P.2d 1029 (1956).)

STATEMENT OF THE CASE

Petitioners present a largely distorted and myopic view of what transpired in the proceedings below. Their Statement Of The Case contains a number of misleading inferences and omissions, if not outright misstatements, which induce a false impression of the relevant circumstances.

A few specific examples are described below in Argument. However, Lynch finds it unnecessary to provide an alternative Statement Of The Case. Mr. O'Sullivan is doing so in his own brief, which should be filed about the same time as this one. Therefore, in an effort to avoid unnecessary duplication, Lynch will simply rely on O'Sullivan's Statement Of The Case.

SUMMARY OF ARGUMENT

Petitioners have failed to demonstrate a federal issue of sufficient importance to warrant consideration by this Court. The major thrust of their argument is devoted to public policy concerns vis-a-vis the regulation of attorneys and the disposition of decedents' estates – both of which are matters generally within the province of each state to deal with.

Still, petitioners add a secondary spin to their argument – one which is couched in terms of "due process." They imply that due process somehow calls for enhanced scrutiny of testamentary gifts to lawyers. Their reasoning in this regard is obscure at best. Evidently, petitioners are merely invoking the due process clause in a transparent attempt to present something they hope will pass as a federal issue. For a number of subsidiary reasons, this contrived effort must fail.

For one thing, it is difficult to fathom what protected rights or property have been taken, or how that was accomplished in violation of established due process standards. The cases cited by petitioners are clearly inapposite.

Furthermore, a proper review of the *complete* record discloses that petitioners received overly-generous consideration of their dubious claims. In fact, the California Court of Appeal directed that their issues of "fraud and undue influence" be addressed by the trial court *sua sponte*, thereby effectively excusing the fact that petitioners had failed to initiate a timely challenge to McHenry's Will.

Then, when the issues were brought to trial, petitioners utterly failed to sustain their position. Contrary to what they now infer, that failure had absolutely nothing to do with any unfairness or lack of adequate opportunity to be heard. Even if they had developed a viable case to present (which they did not), their attorney was simply unprepared to try the case effectively. The trial judge accurately characterized his performance as "inept."

Of even greater importance, the trial court expressly assured that its findings were not merely based on "clear and convincing evidence," but actually rose to the higher standard of "beyond a reasonable doubt."

Finally, even if the relevant circumstances do give rise to a colorable issue of significant concern, future problems of a similar nature have been averted by the enactment of new legislation which virtually eliminates the problem in California.

Based upon all of these considerations, Respondent Lynch respectfully submits that this case presents no question which is either properly before this Court, or which deserves any further attention at this point in time.

ARGUMENT

I.

PETITIONERS HAVE FAILED TO PRESENT A SIGNIFICANT FEDERAL ISSUE WHICH PROPERLY JUSTIFIES THE ATTENTION OF THIS COURT

This Court's prerogative to review a state judicial ruling via writ of certiorari is defined by statute. (28

U.S.C. § 1257.[1]) The fundamental limitation is that any issue to be considered must be "federal" in nature. Moreover, that issue cannot be trivial or insignificant. There must be "special and important reasons" for granting review by certiorari. (*Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897 (1955).)

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations.] 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. . . . " (*Id.* at 349 U.S. 74, 99 L.Ed. 901. See also, USSC rule 10.1(b) & (c).)

The basic structure of petitioners' argument may be viewed as a combination of two different elements; one reflecting considerations of public policy and the other

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[1] Section 1257 provides in relevant part as follows:
" . . . Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. . . . "

purporting to address an issue of constitutional magnitude.[2] In fact, neither component gives rise to a significant federal issue, regardless of whether taken individually or in combination with the other.

A. THE PUBLIC POLICY ELEMENT:

The first theme advanced by petitioners is essentially a policy argument which pertains both to rules governing the disposition of decedents' estates, and also to standards for the regulation of attorneys. Notably, these are matters uniquely within the purview of each state to control and regulate.

For example, this Court has recognized that laws governing the disposition of a decedent's assets are essentially a matter of state concern, if not exclusively so.

> "Rights of succession to the property of a decedent, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. [Citations.]" (*Irving Trust Co. v. Day*, 314 U.S. 556, 562, 86 L.Ed. 452, 457 (1941).)

Obviously, similar principles extend to the regulation of legal practice. To be sure, this Court is free to promulgate rules of practice within its own domain. It also

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[2] Petitioners argue that " . . . [a]n augmented standard of review is . . . warranted under the Due Process clause *and* to protect the integrity of the bar – " (Petn. p. 36 (emphasis added).)

exercises supervisory authority over legal practice in all lower federal courts.[3] However, the corresponding standards of practice in a *state* court are plainly a matter of local concern.

Of course, this is not to say that the states may exercise these regulatory powers arbitrarily or unfairly. As addressed below, the overriding requirements of federal due process apply to insure basic fairness in the pursuit or administration of such state-created rights or privileges. (See, e.g., *Wilner v. Committee on Character & Fitness*, 373 U.S. 96, 10 L.Ed.2d 224 (1963), concerning the fairness of procedures for denying admission to a state Bar.)

By the same token, however, it is difficult to imagine that this, or any other federal court, would presume to impose its own views as to what those rights and privileges ought to be in the first instance. To do so would plainly violate the structural integrity of our federal system. (See dissenting opinion of Justices Harlan and Clark in the *Wilner* case, warning against this Court deciding matters which present something less than "a substantial federal question." *Id.* at 373 U.S. 112, 10 L.Ed.2d at 234.)

While perhaps intriguing from a purely academic standpoint, the policy arguments asserted by petitioners do not give rise to any significant *federal* issue.

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[3] Notably, the two cases cited by petitioners in this regard dealt solely with the exercise of such authority in *federal* tribunals. (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 95 L.Ed. 2d 740 (1987) and *Cuyler v. Sullivan*, 446 U.S. 335, 64 L.Ed.2d 333 (1980), both cited at Petn. p. 29.) In neither case did this Court propose to regulate the practice of law in a state court system.

B. THE "DUE PROCESS" ELEMENT:

In an apparent attempt to overcome these deficiencies, petitioners weave into their argument a thread of "due process" – the second component of their argument. However, they do little more than intone the words "due process" time and time again, as if this were some magical incantation to invoke the powers of certiorari.

Petitioners never really explain how the principles of due process apply in this case. Nor do they identify what freedoms or property rights have been taken in ostensible violation of those principles. They merely complain about having supposedly been deprived " . . . of the opportunity to show impropriety and over-reaching [on the part of Attorney O'Sullivan]." (Petn. p. 34.) Not surprisingly, they cite no authority for the proposition that due process serves to protect such an "opportunity."

In marked contrast, petitioners do refer to a couple of decisions where significant personal rights had been placed at risk. For example, *Honda Motor Co., Ltd. v. Oberg* involved an award of punitive damages in the rather substantial amount of $5,000,000.[4] Likewise, *Jackson v. Virginia* arose from a federal habeas corpus proceeding in which the petitioner's very freedom was at issue.[5] Those cases have little apparent bearing in this case.

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[4] *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 129 L.Ed.2d 336 (1994), cited at Petn. pp. 37-39.

[5] *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560 (1979), cited at Petn. pp. 36-37.

II.

THE "PUBLIC POLICY" COMPONENT OF PETITIONERS' ARGUMENT HAS BEEN SUPERSEDED BY A CHANGE IN CALIFORNIA LAW

As observed above, petitioners have asserted a theory about why and how an attorney should be prevented from taking under a Will which he/she was responsible for drafting. While perhaps interesting from an academic or political standpoint, this component of their argument fails to generate a significant federal issue.

Moreover, even if the Court were inclined to accept this case in order to deal with such policy issues, the entire topic is now a matter of past history in California. In 1993, the State Legislature enacted a number of substantial revisions to California's Probate Code. Among those was the enactment of section 21350 *et seq.*, which generally preclude testamentary gifts to persons responsible for the drafting of a decedent's Will. (The actual text of sections 21350-21355 is reproduced in Appendix "A" to this brief.)

Thus, California already has acted on its own initiative to deal with the perceived problem upon which petitioners rely so intensely. Although the new statute does not apply retroactively so as to affect the outcome in this case, it virtually eliminates the possibility that similar issues will arise in future proceedings. Therefore, it would be improvident for this Court to grant certiorari in order to address those same policy considerations. (*Rice v. Sioux City Cemetery, supra*, 349 U.S. at 74-80, 99 L.Ed. at 901-904.)

III.

EVEN IF A DUE PROCESS QUESTION WERE TO BE RECOGNIZED AS AN ABSTRACT PROPOSITION, THE PRESENT RECORD DOES NOT WARRANT INTERVENTION BY THIS COURT

Turning again to the somewhat ephemeral "due process" element of petitioners' argument, it is important to understand that they have provided an incomplete and distorted picture of the entire situation. Their petition omits mention of several important details, both procedural and substantive, and petitioners carefully attempt to diminish the significance of other telling facts. Included are the following, which easily dispel any possible hint of constitutional deprivation:

A. In effect, petitioners maintain that their claim of "undue influence" received inadequate consideration, both at the trial court and appellate levels. This contention is easily refuted by the actual record.

Notably, Petitioners filed their initial will contest beyond the applicable statutory deadline. After summary judgments had been granted against them on this basis, the State Court of Appeal gave them a second chance. Although recognizing that their will contest was untimely, the Court remanded proceedings so that Mr. O'Sullivan's conduct could be examined at an appropriate hearing – on the trial court's *own motion* if necessary. (See Petn. p. 54a.)

This ruling was based upon sound considerations of public policy. In a very real sense, petitioners were incidental and undeserving beneficiaries of the Court's concern. In any event, they got exactly what they wanted –

an opportunity to litigate their position in full. That they eventually failed to make anything of that opportunity is due to no fault of the system.

B. Petitioners then proceeded to complicate matters by bringing separate actions in connection with the same basic subject-matter. Among other things, they chose to litigate their ancillary claims of theft and forgery in a separate action to probate a "destroyed will."

In reality, petitioners had absolutely no evidence to substantiate either the existence or contents of any such "destroyed will." As a result, summary judgment was entered against them on those issues, and the Court of Appeal affirmed. (That decision, not supplied by petitioners, is reproduced in the Appendix to Mr. O'Sullivan's brief at pp. 1-11.) In particular, the Court of Appeal observed that petitioners' opposition was " . . . based on conjecture and speculation and [was] insufficient to raise a triable issue of fact as to the existence, distruction and contents of the purported will." (*Id.* at p. 10.)

In view of that ruling, the issues which remained for trial in the main action were now limited to whether McHenry's final Will had been procured by fraud or undue influence. Although petitioners still attempted to litigate the same issues of "forgery," etc., their offer of proof was properly rejected " . . . on the ground that the validity of the will had already been determined by the appellate court." (Petn. p. 26a.)

C. Although not entirely clear, it seems that the major thrust of petitioners' argument concerns both the

burden of proof and standard of review applied to measure the validity of their claims. In effect, they suggest that higher standards should have been imposed to more effectively police the conduct of attorneys, and also to vindicate the requirement of procedural due process (in some vague and inexplicable manner).[6] However, what petitioners curiously neglect to mention is that the trial court expressly *did* employ such a higher standard.

To begin with, the trial court correctly shifted the burden of proof to O'Sullivan, requiring that he present evidence to overcome the presumption of undue influence. After he had done so, it devolved upon petitioners to supply rebuttal evidence. Although they attempted to do so, their witnesses were so badly impeached, and their evidence so thoroughly refuted, that their case completely fell apart. As a result, the trial court observed that the presumption had not merely been rebutted on clear and convincing evidence, but that the validity of McHenry's Will had been established "beyond a reasonable doubt." (See the Appendix to Mr. O'Sullivan's brief at p. 26.)

D. Contrary to petitioners' repeated suggestion, that outcome had absolutely nothing to do with any

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[6] Incidentally, petitioners never raised this particular argument in any state court. Although they did argue generally (and confusingly) on "due process" grounds in their petition for review before the California Supreme Court, they barely mentioned anything at all about the standard of proof at trial, much less the standard of review on appeal. (See Appendix "B.") The instant petition may be denied on this basis alone. (*Cardinale v. Louisiana*, 394 U.S. 437, 438, 22 L.Ed.2d 398, 400 (1969).)

procedural unfairness. Even if they had developed a viable case to present (which they clearly did not), their attorney was simply too disorganized and unprepared to make an effective showing. The record clearly demonstrates that he required excessive amounts of time to frame each question, and that he stumbled along without any apparent plan or direction. As a result, the Court of Appeal ultimately found that " . . . the lack of merit of his actions and tactics is attributable to his degree of competence and not to any proven bad faith. [Footnote omitted]." (Petn. p. 33a.)

E. Finally, although petitioners attempt to imply that O'Sullivan totally dominated the disposition of McHenry's estate, they neglect to mention that there was a second, independent executor keeping watch over the situation. That second executor was Howard Marvin, who stood to recover no part of the estate residue. (He had received a specific bequest in the relatively modest amount of $100,000. See Petn. pp. 24a-26a.)

In effect, Mr. Marvin acted as a neutral and independent observer. He retained his own attorney and together they monitored all proceedings to ensure that Shelton McHenry's true wishes were carried out.

In other words, this is clearly not the sort of case where a wayward attorney managed to take complete control of a client's estate, without oversight or scrutiny from any quarter. Petitioners' suggestions to the contrary are simply without support in the record.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the instant petition for writ of certiorari be summarily denied. However, should this Court find reason to grant the writ, Respondent Lynch respectfully requests that review be expressly limited to the residuary gift in favor of Shelton McHenry's lawyer, Mr. O'Sullivan. Apropos to this latter point, the Court of Appeal expressed these salient comments in its decision:

> "Appellants [petitioners] conveniently disregard the fact that Lynch denied any knowledge of or participation in the procuring of the contested will and codicil – or any other will for that matter – and the trial court found no hint of participation, much less fraud or wrongdoing on his part. Since there is substantial evidence to support the trial court's finding, the presumption of undue influence was never triggered with respect to Lynch. [Citations.] It is appellants who failed to sustain their burden of proving undue influence." (Petn. p. 22a.)

Respectfully submitted,

MARSHALL W. VORKINK
KENT M. BRIDWELL
MICHAEL M. BERGFELD

Attorneys for Respondent,
Estate of John T. Lynch, Deceased